Ke Ka Tong Sdn Bhd v Datuk Bandar Kuala Lumpur

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–493 OF 1998
RICHARD MALANJUM, HASHIM YUSOFF JJCA AND ABDUL WAHAB PATAIL J
22 JANUARY 2008

Local Government — Rates — Arrears of assessment — Recovery of — Order for sale — Intention of Legislature — Whether ss 148 and 151 of the Local Government Act 1976 must be read together to ascertain legislative intention — Local Government Act 1976 ss 148 & 151

The appellant appealed against a decision made by the High Court refusing to set aside its earlier default order which allowed the respondent to auction four parcels of land belonging to the appellant who failed to settle assessments taxes, warrant penalties plus interest at the rate of 6% per annum from 1 October 1994 until full payment with costs. It was also in the earlier order that the balance of the sale proceeds of the auction would be paid to the relevant parties in accordance with s 151(3) of the Local Government Act 1976. The appellant contended that the learned High Court judge erred in not reading together ss 148 and 151 of the Local Government Act 1976 in order to determine the intention of the Legislature. The appellant also contended that the word 'may' found in s 148 is mandatory rather than merely directory and as a result the High Court judge failed to consider the implication arising from the opening words in s 151 of the Local Government Act 1976.

Held, allowing the appeal with costs:

(1) Both ss 148 and 151 should be read together if the intention of the Legislature is to be given any effect (see para 7).

(2) However, the opening words of s 151 makes it imperative that it is the intention of the Legislature to require that the local authority first exhausts the mechanisms provided in s 148 for the recovery of arrears outstanding due to it including the service of Form H given under the proviso of sub-s (2) of s 148 (see para 10).

(3) The local authority is entitled to rely on other avenues to recover the arrears other than s 148. However, the word 'may' in s 148 suggests that

A if the local authority is inclined to rely on s 151, the provisions of s 148 must be first observed. Thus, the learned High Court judge erred when it ruled that s 148 did not apply in this case (see paras 6 & 13).

(4) Further, s 148 or s 151 does not impose upon the appellant or debtors of the local authority the duty to ensure that the local authority has done all that is required to be done under s 148 (see para 12).

[Bahasa Malaysia summary

C Perayu merayu terhadap satu keputusan yang dibuat oleh Mahkamah Tinggi yang menolak untuk mengenepikan perintah ingkar terdahulu yang membenarkan responden untuk melelong empat bidang tanah kepunyaan perayu yang telah gagal membayar cukai-cukai taksiran, penaliti waran termasuk faedah pada kadar 6% setahun dari 1 Oktober 1994 sehingga D semua pembayaran penuh dengan kos. Perintah terdahulu juga menyatakan baki keuntungan dari jualan lelong akan dibayar kepada pihak-pihak berkenaan selaras dengan s 151(3) Akta Kerajaan Tempatan 1976. Perayu menegaskan bahawa hakim Mahkamah Tinggi telah tersilap dengan tidak membaca bersama ss 148 dan 151 Akta Kerajaan Tempatan 1976 untuk E menentukan hasrat badan perundangan. Perayu juga menegaskan bahawa perkataan 'boleh' yang terdapat dalam s 148 adalah mandatori dan bukan sekadar direktori dan akibatnya hakim Mahkamah Tinggi telah gagal untuk mempertimbangkan implikasi yang boleh timbul dari kata-kata pembuka dalam s 151 Akta Kerajaan Tempatan 1976.

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Diputuskan, membenarkan rayuan dengan kos:

(1) Kedua-dua ss 141 dan 151 sepatutnya dibaca bersama jika niat badan G perundangan hendak diberi sebarang kesan (lihat perenggan 7).

(2) Namun begitu, kata-kata pembuka s 151 adalah penting di mana niat badan perundangan menghendaki kerajaan tempatan terlebih dahulu menggunakan segala mekanisma yang diperuntukkan dalam s 148 untuk mendapatkan semula tunggakan yang belum berbayar itu H termasuk penyampaian Borang H yang diberikan di bawah proviso sub-s (2) kepada s 148 (lihat perenggan 10).

(3) Kerajaan tempatan berhak untuk bergantung kepada sumber-sumber lain untuk mendapatkan semula tunggakan selain daripada s 148. I Walau bagaimanapun, perkataan 'jika' mencadangkan bahawa jika kerajaan tempatan cenderung untuk bergantung kepada s 151, peruntukan s 148 perlu dilihat dahulu. Oleh itu, hakim Mahkamah Tinggi yang bijaksana tersilap apabila beliau memerintahkan s 148 tidak terpakai dalam kes ini (lihat perenggan 6 & 13).

(4) Selanjutnya, s 148 atau s 151 tidak mengenakan ke atas perayu atau penghutang-penghutang kerajaan tempatan tugas untuk menentukan bahawa kerajaan tempatan telah melakukan semua yang perlu dilakukan di bawah s 148 (lihat perenggan 12).]

Notes

For cases on arrears assessment, see *Mallal's Digest* see 10 (4th Ed, 2005 Reissue) paras 145–155.

Cases referred to

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Shell Malaysia Trading Sdn Bhd v Pemungut Duti Setem, Pulau Pinang [1998] 1 MLJ 726 (refd)

Legislation referred to

Local Government Act 1976 ss 148, 148(2), 151, 151(3), Form H
Rules of the Court of Appeal 1994 r 102

Appeal from: Originating Summons No S4–24–1064 of 1994 (High Court, Kuala Lumpur)

Bastian Vendargon (Jayaraman, Ong & Co) for the appellant.
Karida Ramli (Samat Din & Partners) for the respondent.

Richard Malanjum JCA (now CJ (Sabah and Sarawak) delivering judgment for the court):

[1] This is an appeal against the decision made by the High Court on 16 July 1998 refusing to set aside its earlier order made on 13 March 1995. The earlier order was a default order which allowed the respondent to auction four parcels of land along Jalan Stonor Kuala Lumpur belonging to the appellant who failed to settle assessments taxes, warrant penalties plus interest at the rate of 6% per annum from 1 October 1994 until full payment with costs. It was also in the earlier order that the balance of the sale proceeds of the auction would be paid to the relevant parties in accordance with s 151(3) of the Local Government Act 1976 ('the Act').

[2] In its application to set aside the earlier order the appellant relied on several grounds, both technical and substantially on the interpretation of ss 148 and 151 of the Local Government Act 1976. None of the grounds persuaded the learned High Court judge. At the same time the learned High Court judge allowed the recitals in the earlier order to be rectified on the application by the respondent.

A **[3]** Before us the appellant relied on the same issues as canvassed before the High Court. While resisting the appeal the respondent also raised a preliminary objection at the outset of the hearing.

B **[4]** After hearing the arguments on the preliminary objection we dismissed it. We do not think it has any merit. The errors referred to were typographical errors. In any event it was not shown to us that the respondent suffered injustice and prejudice as a result of such errors or non-compliance to the Rules of the Court of Appeal 1994. Further, we bear in mind r 102 of the
C Rules of the Court of Appeal 1994 which provides that 'non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or judge shall so direct, but such proceeding may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the
D court of judge shall think fit'.

[5] On the appeal proper learned counsel for the appellant complained that the learned High Court judge went beyond her role in an adversarial system by investigating the error in the earlier order when it should be the obligation
E of the respondent to make the necessary application to rectify the error. With respect we do not think there is any merit in this complaint. In any event the respondent did make an application albeit subsequently.

F **[6]** Next, learned counsel for the appellant contended that the learned High Court judge erred in not reading together ss 148 and 151 of the Local Government Act in order to determine the intention of the Legislature. By attributing to the word 'may' as found in s 148 as merely directory rather than mandatory, the learned High Court judge failed to consider the
G implication arising from the opening words in s 151.

[7] We have considered this argument and with respect to the learned High Court judge we think there is valid basis for it. In view of the words used in the sections we are of the opinion that the two sections should be read
H together if the intention of the Legislature is to be given any effect.

[8] Indeed 'in the deliberation to ascertain legislative intention, the court has to be mindful that the Act, taken as a whole and the general object intended to be secured by the Act, as viewed from the context of the
I particular provision involved, has to be considered and if such provision has a proviso, both the provision and the proviso are to be read in such a manner that they mutually throw light on each other and result in a harmonious construction' (see *Shell Malaysia Trading Sdn Bhd v Pemungut Duti Setem, Pulau Pinang* [1998] 1 MLJ 726).

[9] Reverting to the appeal at hand no doubt s 148 begins with this phrase: **A**

> For the recovery of an arrear the local authority may issue a warrant of attachment in Form F...

[10] However, the opening words of s 151 makes it imperative to find that it is the intention of the Legislature to require the local authority to first exhaust the mechanisms as provided in s 148 for the recovery of arrears outstanding due to it. The opening words read: **B**

> If the arrear cannot be recovered in the manner provided in s 148 it shall be lawful for the registrar of the High Court upon application made by the local authority, ... **C**

[11] In other words it is for the local authority to show that it has exhausted all the mechanisms as provided for in s 148 including the service of Form H given under the proviso of sub-s (2) of s 148 when making an application under s 151. **D**

[12] Contrary to what was contended before us we do not think s 148 or s 151 imposes upon the appellant or debtors of the local authority the duty to ensure that the local authority has done all that is required to be done under s 148. **E**

[13] Meanwhile, we are not saying that the local authority is not entitled to rely on other avenues to recover the arrears other than s 148. That explains the use of the word 'may' in s 148. However, if it is inclined to rely on s 151 then the provisions of s 148 must be first observed. With respect we think the learned High Court judge erred when she ruled that s 148 did not apply in this case. **F**

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[14] For the foregoing reason alone that we should allow the appeal.

[15] Learned counsel for the appellant also submitted that it was wrong to order the sale of all the four pieces of land in one order when the arrears varies and relates to different pieces of land. **H**

[16] We find no merit in the argument. Section 151 does not limit the scope of an order that may be made by the registrar of the High Court. It is permissible to '*to order the attachment and sale of the holding or holdings in respect of which the arrear has accrued*'. **I**

[17] On the issue that the respondent failed to file any affidavit in reply to the affidavits filed by the appellant we are in agreement with learned counsel

A for the appellant that the learned High Court judge erred when she allowed the use of an affidavit related to an earlier application which had been struck out. Even if it could be done at least there should have been a notice taken by the respondent expressing its intention to use the same. Without any affidavit in reply it could be assumed that the respondent had admitted the
B averments in the affidavits filed by the appellant (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). Ipso facto the application by the appellant to set aside the earlier order should have been allowed.

C **[18]** For the above reasons we allowed the appeal by the appellant with costs.

Appeal allowed with costs.

D Reported by Dipendra Harshad Rai

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